

## 8 Official Opinions of the Compliance Board 176 (2013)

### ◆ Minutes – Generally

- ◇ Minutes to be prepared “as soon as practicable”
- ◇ When timely adoption of minutes in a meeting is impracticable through no fault of the public body, public body should adopt them by a different method
- ◇ Belated adoption of closed session minutes not a substantial violation

\*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

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May 15, 2013

Re: Maryland State Board of Elections (*Craig O'Donnell*)

We have considered the complaint of Craig O'Donnell, (“Complainant”) that the Maryland State Board of Elections (“SBE”) violated the provisions of the Open Meetings Act (the “Act”) on the timely adoption of the minutes of four open meetings and two closed meetings. SBE has acknowledged that, through an oversight, it had not adopted the draft minutes that had been prepared for its February 2012 closed session. SBE further states that it has recently adopted bylaws that will permit it to approve minutes more promptly.

As we explain below, we do not find any substantial violations of the Act.

### Facts and Allegations

Complainant alleges that SBE violated the Act by “routinely delay[ing]” the adoption of its minutes “beyond 4 to five weeks.” He alleges two violations in particular: (1) SBE’s practice of adopting its minutes only in its open meetings, which sometimes have occurred at intervals greater than one month; and (2) SBE’s failure to adopt minutes of two closed sessions. Complainant asserts that SBE’s bylaws, which provide for the adoption of closed-session minutes only during a closed session, do not take into account SBE’s obligations under the Act.

SBE’s Deputy Administrator, responding on SBE’s behalf, states that SBE has now amended its by-laws to reduce delays in its adoption and posting of minutes. The by-laws now provide for circulation of the open

and closed meeting minutes to the members within one week of the meeting, for a five-day comment period by the members, and then for authorization by the Chair and posting on the website. The Deputy Administrator further explains that SBE usually meets monthly, that it sometimes has to cancel a meeting for lack of a quorum, and that it usually meets nine times per year. As to the adoption of closed-session minutes, SBE responds that those minutes are adopted in either of two forms. For all closed meetings, SBE prepares a closed-session summary that the members adopt as part of the minutes of that month's open meeting. Especially when a meeting is closed for an informational briefing on the contents of a confidential document, SBE has deemed that summary to serve also as SBE's minutes of the closed session and has not adopted separate "closed meeting minutes." When the members use the closed session instead to hold their own discussion or more detail is needed for other reasons, SBE staff draft a separate set of closed meeting minutes for later adoption by the Board. The Deputy Administrator explains that separate minutes were drafted for the February 2012 closed session, but, through an oversight, were never approved.

SBE's website shows that it regularly meets on the fourth Thursday of every month and has canceled three to four monthly meetings per year over the last several years. In 2012, the year about which Complainant complains, the minutes show that SBE canceled meetings in January, April, July, and November. The missed meetings occasioned delays of seven to nine weeks in the adoption of minutes. SBE missed two meetings in a row once in 2009 and once in 2010.

## **Discussion**

### *A. The timely adoption of minutes*

We begin with Complainant's assertion that SBE violates the Act by "routinely delaying" the adoption of its minutes "beyond 4 to five weeks." When a public body keeps its minutes in written form, as opposed to one of the other formats permitted by the Act, the Act requires public bodies to have them prepared "as soon as practicable." State Government Article ("SG") § 10-509(b). Public bodies that meet monthly generally comply with that requirement by adopting minutes at each meeting. Public bodies that routinely only meet quarterly, we have stated, should find an alternative way of adopting minutes so that people who could not attend the meeting do not have to wait three months to find out what the public body did. That is the only objective standard we have set in our interpretation of the minutes requirement. 8 *OMCB Opinions* 173 (2013). SBE has now adopted an alternate method.

As we explained in that recent opinion, we have not casually recommended to public bodies that they adopt their minutes by circulating drafts. Instead, we have very expressly stated that the adoption of minutes that way is the rare exception to the principle that public business should be conducted in the open. *See, e.g., 8 OMCB Opinions* 125, 126 (2013). That

rare exception is justified, we have thought, when, on balance, the Act's goal of transparency is served more by the prompt dissemination of minutes than by affording the public the opportunity to observe the adoption of them in an open session. *Id.*

Here, SBE has commendably taken steps to disseminate the events of its meetings more promptly. We think it appropriate for SBE to take those steps when an interval between its meetings grows unexpectedly long because of scheduling problems. In our view, however, the balance comes out very differently for SBE's regular monthly meetings; the review of minutes can sometimes give rise to substantive discussion, and there is much to be said for the members of a public body adhering strictly and routinely to a habit of holding every potentially substantive discussion in public.

#### *B. Adoption of closed-session minutes*

As to the Complainant's two allegations about the adoption of closed-session, or "sealed," minutes, we first address SBE's failure to adopt its closed-meeting summaries<sup>1</sup> separately under the label of "closed meeting minutes." Unlike open meeting minutes, which tell the public what the public body did in its open meeting and provide some information about its closed meetings, sealed minutes serve only two purposes: first, to give the public body an internal record of the events of the meeting, and, second, to stand as a document that we may inspect to determine whether the topics discussed in the closed session fell within an exception to the Act's openness mandate. *See* SG § 10-502.5(c) (ii), (iii) (providing that the Board may inspect sealed minutes).

The sufficiency of the sealed minutes for the public body's internal purposes is a matter for the public body. As to the second purpose, a public body that uses its closed-session summary as sealed minutes should ensure that they both contain enough detail to show us that the discussion stayed within the bounds of the exception claimed and establish that the public body did, in fact, keep minutes of the session. *See* SG § 10-509 (requiring public bodies to keep minutes of their meetings). Here, SBE's practice of not adopting "closed meeting minutes" when it deems its closed-session summaries to be an adequate record falls more into the category of a labeling error than a substantive violation of the Act.

We turn finally to SBE's failure to adopt its February 2012 sealed minutes, an omission SBE attributes to an "oversight," as its staff had prepared a draft, and that it pledges not to repeat. SBE's error violated the letter of the Act, which requires that "minutes" be "prepared" as "soon as practicable," SG § 10-509(b), because SBE does not claim that adoption

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<sup>1</sup> By "closed-session summaries," we mean the statutorily-required disclosures of certain information about the events of a closed meeting. *See* SG § 10-509(c)(2). As those disclosures must be made in the "minutes for the [public body's] next open session," *id.*, they have been adopted by the public body.

within twelve months was impracticable. Still, SBE's failure to adopt these already-prepared draft minutes neither deprived the public of information to which it was entitled nor interfered with our review of SBE's compliance with the Act. We therefore do not deem it to be a substantial violation of the Act.

### **Conclusion**

On the facts submitted to us, we find that SBE did not violate the Act by adopting its minutes less frequently than monthly when its monthly meeting had to be canceled. The practice SBE has adopted of adopting minutes by circulation is a good method on which to fall back in the event of a long hiatus between meetings, but SBE should use it sparingly so as to avoid slipping into a broader use of that way of conducting public business. The allegations about SBE's sealed minutes state technical errors that we do not deem to be substantial violations of the Act.

Open Meetings Compliance Board

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